

2005

# Richard G. Fordham v. Ryan Oldroyd : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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RICHARD G. FORDHAM,

Plaintiff-Appellant,

-v-

RYAN OLDROYD,

Defendant-Appellee.

OPENING BRIEF OF  
PLAINTIFF-APPELLANT,  
RICHARD G. FORDHAM

Case No. 20050325CA

---

APPEAL FROM FINAL ORDER (SUMMARY JUDGMENT)  
OF THE THIRD JUDICIAL DISTRICT COURT  
OF SALT LAKE COUNTY, STATE OF UTAH  
(HONORABLE L.A. DEVER)

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ORAL ARGUMENT AND PUBLISHED DECISION REQUESTED.

FILED  
UTAH APPELLATE COURT  
JUN 23 2005

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## **I. STATEMENT OF JURISDICTION**

This Appeal is from a final order (Order Granting Defendant's Motion for Summary Judgment) of the Third Judicial District Court of and for Salt Lake County, State of Utah (Honorable L.A. Dever). Richard G. Fordham, the plaintiff-appellant, appealed to the Utah Supreme Court, which has jurisdiction pursuant to Utah Code Ann. §78-2-2(3)(j). The Utah Supreme Court, pursuant to Utah Code Ann. §78-2-2(4), transferred this Appeal to this Court. This Court has jurisdiction of this Appeal pursuant to Utah Code Ann. §78-2a-3(2)(j).

## **II. STATEMENT OF ISSUE PRESENTED FOR REVIEW**

Whether the District Court committed reversible error when it determined that the "Fireman's Rule" prohibits Mr. Fordham from pursuing his claim against defendant-appellee Ryan Oldroyd and, accordingly, granted Mr. Oldroyd's Motion for Summary Judgment.

### **(Standard of Review)**

Summary judgment should be affirmed only if there is no genuine dispute of material fact and only if the moving party is entitled to judgment as a matter of law. The appellate court reviews the trial court's legal conclusions for correctness. *E.g.*, Andreini v. Hultgren, 860 P.2d 916, 918 (Utah 1993). The appellate court does not defer to the trial court's ruling on appeal of a

grant of summary judgment. *E.g.*, Cannon v. University of Utah, 866 P.2d 586, 588 (Utah App. 1993). On review of a grant of summary judgment, the appellate court views the facts, and all reasonable inferences drawn therefrom, in the light most favorable to the non-moving party. *Id.*

(Issue Preserved in Trial Court)

This issue was preserved in the District Court by Mr. Fordham's Memorandum in Opposition to Defendant's Motion for Summary Judgment (R. 88-126) and by his counsel's oral argument, presented on March 16, 2005, in opposition to that Motion.

**III. STATEMENT OF THE CASE**

**A. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION IN THE DISTRICT COURT**

This Appeal, in this case that stems from an incident in which Mr. Fordham, a Utah Highway Patrol Trooper, was severely injured, is from the District Court's order granting Mr. Oldroyd's Motion for Summary Judgment entered pursuant to the District Court's determination that the "Fireman's Rule" prohibits Mr. Fordham from prevailing in this litigation.

Mr. Fordham alleged, in his Complaint (R. 1-4), that Mr. Oldroyd was negligent in connection with the subject incident of December 28, 2003 and that, as a proximate cause of Mr. Oldroyd's alleged negligence, Mr. Fordham has sustained substantial compensable damages. Mr. Oldroyd in his Answer



(R. 7-12) denied those allegations. After limited discovery, including the taking of the depositions of Mr. Oldroyd and Mr. Fordham, Mr. Oldroyd filed his Motion for Summary Judgment (R. 39-40) and his Memorandum in support of that Motion (R. 41-87). Mr. Fordham submitted his Memorandum in opposition to that Motion (R. 88-126), along with a Request for Hearing and Oral Argument (R. 127-28). Mr. Oldroyd then submitted his Reply Memorandum in support of his Motion for Summary Judgment (R. 129-46) and his Request to Submit for decision and his own Request for Oral Argument (R. 147-47).

Oral argument was held on Mr. Oldroyd's Motion for Summary Judgment on March 16, 2005. At the conclusion of that hearing the District Court, announcing its determination that the Fireman's Rule prohibits Mr. Fordham from maintaining this action against Mr. Oldroyd for injuries sustained when Mr. Fordham was struck by another driver while he was at the scene of a rollover accident caused by Mr. Oldroyd's negligence, from the bench orally granted Mr. Oldroyd's Motion. That ruling was formalized by the District Court's Order Granting Defendant's Motion for Summary Judgment (R. 163-64; copy set forth in the Addendum hereto at 01-02).

This Appeal ensued.

## **B. STATEMENT OF FACTS**

1. On December 28, 2003, on the (eastbound) 600 South off-ramp from I-15, in Salt Lake City, Mr. Oldroyd allegedly operated a motor vehicle negligently and in violation of his duty of care. R. 2; 41-42.

2. Among other things, Mr. Oldroyd was allegedly driving too fast for existing conditions (the roadway surface was snowy and/or icy), failed to operate the vehicle he was operating within a single lane, and failed to keep that vehicle under control. R. 2; 41-42. As alleged proximate results of Mr. Oldroyd's subject negligence, Mr. Oldroyd lost control of his vehicle, that vehicle traveled across the traffic lanes to its left, struck a snow bank on the left (north) side of the roadway, overturned onto its top, and blocked the northern-most off-ramp travel lane. R. 2.

3. As alleged further proximate results of Mr. Oldroyd's subject negligence, Mr. Fordham, a Utah Highway Patrol Trooper who had been called to the scene, stopped his Highway Patrol vehicle for traffic control and highway safety purposes, in the immediate vicinity of the vehicle that Mr. Oldroyd had been operating, and was in the process of getting flares out of the trunk of his Highway Patrol vehicle when another person operating another vehicle on the same off-ramp encountered ice and/or snow on the roadway and lost control of that vehicle, and that vehicle struck Mr. Fordham. R. 2-3; 42.

4. As alleged further proximate results of Mr. Oldroyd's alleged subject negligence, Mr. Fordham has sustained severe bodily injuries, including a leg injury that nearly resulted in amputation; has sustained substantial lost income and earning capacity; has sustained substantial impairment and disability; has experienced substantial physical and emotional pain and suffering; has sustained substantial disfigurement; has sustained substantial loss of, and diminution of, enjoyment of various life activities; has incurred substantial health care expenses; has sustained a substantial loss of his pre-incident ability to provide household services; has sustained and incurred additional "special" and "general" damages; and will, in the future, sustain and incur substantial additional such damages, all to his damage in compensable and reasonable amounts to be determined by the jury herein.

R. 3.

5. Prior to filing this action, Mr. Fordham settled with the driver of the vehicle that struck him for her liability insurance policy limits of \$50,000.

6. Mr. Fordham was also eligible for, and has received, workers compensation benefits.

7. Mr. Oldroyd has acknowledged that, as he came down the hill from the off-ramp, he encountered "black ice," lost control momentarily, then regained control, then lost control again, then slid, fishtailing across other

lanes of traffic, and his car then hit a snow bank piled up against the barrier on the left (north) side of the road and flipped over. R. 156-57.

8. Mr. Oldroyd saw the other vehicle striking Mr. Fordham. R. 158.

9. It appeared to Mr. Oldroyd that the experience that the driver of the vehicle that struck Mr. Fordham had with the roadway was not exactly like his but similar to his, and he believes that the other driver encountered the same problem on the roadway that he had encountered and that the other driver's experience occurred within about one-half hour of the time that his rollover incident had occurred. R. 158-59.

10. Mr. Oldroyd saw approximately five cars slipping or sliding on the roadway between the time of his rollover incident and the time the driver whose vehicle struck Mr. Fordham came along, and those cars seemed to have about the same kind of initial reaction that his car had had at about the same spots on the roadway. R. 159-60.

11. Those other drivers were able to regain control of their vehicles without coming clear across the roadway and striking the snow bank on the left side and were able to regain control of their vehicles and just keep going down the hill, and there was a mix of SUVs and passenger cars among those vehicles. R. 160.

12. Mr. Oldroyd had encountered black ice and slush in his previous driving experience and knew from his driving experience that, if one encountered black ice or slush, there was a potential for one's losing control and sliding and perhaps striking a snow bank and perhaps overturning and perhaps losing control and hitting other vehicles or persons in the way. R. 160-61.

13. It is Mr. Oldroyd's understanding that Mr. Fordham was among the officers who arrived at the scene to investigate and assist with Mr. Oldroyd's accident. R. 163.

14. Mr. Oldroyd knew prior to the time of the subject incident that, if he should lose control and get into an accident himself (a rollover or some other kind), officers of the law would be coming to investigate and assist. R. 162.

#### **IV. SUMMARY OF ARGUMENT**

The District Court committed reversible error in summarily dismissing Mr. Fordham's claim on the basis of the so-called "Fireman's Rule."

The sole basis for Mr. Oldroyd's Motion for Summary Judgment and the sole basis for the District Court's granting that Motion was the Fireman's Rule, a common-law doctrine that, where accepted and applied to facts such as those pertinent to this case, works to prohibit injured public safety officers from

prevailing in personal injury actions against those whose negligence causes them to be, in the exercise of their job duties, at the scene of incidents in which they are injured. The Fireman's Rule has been accepted, to varying degrees and in various forms, by the courts of many jurisdictions. It has also been rejected outright, or limited in its ambit, in ways that would not prohibit Mr. Fordham from prevailing on his claims against Mr. Oldroyd, by courts of other jurisdictions.

This case presents, in Utah, an important issue of first impression. Neither this Court nor the Utah Supreme Court appears ever to have addressed the question of whether a public safety officer (a fire or police officer) may maintain a personal injury action against a person whose negligence has led to that public safety officer's being present at a scene at which he or she is subsequently injured. Neither this Court nor the Utah Supreme Court appears ever to have addressed the question of whether application of the Fireman's Rule is at odds with the Utah statutory scheme or unfairly discriminates against public safety officers. This Court should rule that the Fireman's Rule is, indeed, at odds with the Utah statutory scheme; does, indeed, unfairly discriminate against public safety officers; and should not be deemed to be part of the common law of the State of Utah. This Court should reverse the grant of summary judgment and remand this case for trial.

## **V. ARGUMENT**

### **THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN ADOPTING THE FIREMAN'S RULE AND IN DETERMINING THAT THAT RULE PROHIBITS MR. FORDHAM FROM PURSUING HIS CLAIMS AGAINST MR. OLDROYD.**

The "Fireman's Rule" is a widely rule recognized which, where it is followed, prevents firefighters and police officers injured in the course of their duties from recovering from those whose negligence proximately caused their injuries or from the owner or occupant of premises who is responsible for creating the condition requiring their presence on the property. The Fireman's Rule has been applied to preclude recovery against negligent motorists for injuries sustained by police officers which were reasonably foreseeable in the course of their duties on the highway. The rule is applicable where a police officer is responding to or investigating an automobile accident and where an officer is injured as a result of a motorist's actions in negligently stopping on a highway.

Am.Jur.2d Automobiles & Highway Traffic §691 (emphasis added). R. 43

(Memorandum in Support of Defendant's Motion for Summary Judgment).

Unlike many courts, the Utah appellate courts appear never to have discussed the Fireman's Rule, the sole basis for Mr. Oldroyd's Motion for Summary Judgment and the sole basis on which the District Court granted that Motion.

It appears that there would be no other valid basis for the Motion to have been made. First, there is, at a minimum, a question of fact as to whether Mr. Oldroyd was negligent in losing control of his vehicle and causing it to roll over, and Mr. Oldroyd may have conceded negligence. The Order Granting

Defendant's Motion for Summary Judgment (R. 163-64), prepared by

Mr. Oldroyd's counsel, states, in part:

Plaintiff, as a highway patrol trooper, acting in the course and scope of his employment, cannot maintain a cause of action against Defendant for injuries sustained when he was struck by another driver while at the scene of a rollover accident caused by Defendant's negligence.

(Emphasis added.)

Similarly, there is, at a minimum, a question of fact as to the proximate cause connection between Mr. Oldroyd's negligence and the injuries and damages sustained by Mr. Fordham. Utah law is clear that an intervening negligent act (Mr. Fordham does not dispute the proposition that the driver who struck him was negligent) is not necessarily a superseding cause that relieves an original actor such as Mr. Oldroyd of liability. The Utah Supreme Court has clearly held, in Godesky v. Provo City Corp., 690 P.2d 541, 545 (Utah 1984):

The earlier actor is charged with the foreseeable negligent acts of others. Therefore, if the intervening negligence is foreseeable, the earlier negligent act is a concurring [not superseding] cause.

See, also, MUJI 3.16, and other cases there cited. It is also a matter of clearly established Utah law that the negligence of two or more persons may combine to produce an injury and that the negligence of two or more persons may be proximate causes of the same injury, in which case the negligent persons must share liability, for the subject injuries and damages, in proportion to their



individual percentages of negligence. See, e.g., MUJI 3.15 and cases there cited.

Given the similarities between Mr. Oldroyd's driving conduct and losing control of his vehicle and the conduct and losing control of her vehicle of the driver who struck Mr. Fordham, given such things as the short passage of time between Mr. Oldroyd's conduct and that of the other driver, and given Mr. Oldroyd's own acknowledgments (see Facts numbered 7-13, set forth at pp. 5-7 above), there is clearly, at a minimum, a question of fact as to whether Mr. Oldroyd's negligence, was a proximate cause of Mr. Fordham's injuries and damages. Mr. Oldroyd apparently acknowledges the correctness of that proposition, or else he would be expected to have contested it in his Motion for Summary Judgment. It thus appears clear that, unless the District Court's determination that the Fireman's Rule prohibits Mr. Fordham from maintaining this action against Mr. Oldroyd is affirmed, Mr. Fordham should be allowed to present his claim against Mr. Oldroyd to a jury and that the jury should be allowed to determine the respective percentages of causal fault of Mr. Oldroyd and the driver whose vehicle struck Mr. Fordham, as well as the amounts of Mr. Fordham's compensable damages.

One of the underpinnings of some cases relied on by Mr. Oldroyd in the District Court proceedings and on which Mr. Oldroyd is expected to rely in this

Appeal is the notion that firefighters and police officers “assume the risk” of injuries in connection with their employment.<sup>1</sup> It is well-established, however, that, in Utah, assumption of risk is not an absolute defense. *E.g.*, Moore v. Burton Lumber & Hardware Co., 631 P.2d 865, 868-72 (Utah 1981).

Furthermore, the basic philosophy of Utah tort law and the Liability Reform Act of 1986, codified at Utah Code Ann. §§78-27-37 to -43, is that each tortfeasor must pay his, her, or its fair share of a plaintiff’s damages. The Utah Legislature has made no exception to that rule of law for public safety officers, and there is no good reason for the courts of the State of Utah to adopt a common law exception to that rule.

Mr. Oldroyd made much, in the District Court proceedings, of the fact that Mr. Fordham has received workers compensation benefits, and is expected in this Appeal to contend that that fact is somehow relevant to the question of whether the Fireman’s Rule should be adopted and applied to the facts of this case. It is significant, with respect to that proposition, that the Utah Legislature has determined that it is permissible for one who receives

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<sup>1</sup> The District Court’s Order from which this Appeal is taken concludes with this language:

The Court finds that the type of risk which resulted in injury to [Mr. Fordham] is precisely the type of risk [Mr. Fordham] was hired to confront as a highway patrol trooper, and the “Fireman’s Rule” therefore precludes [Mr. Fordham’s] claim of negligence against [Mr. Oldroyd].

workers compensation benefits to also pursue a tort claim or claims against the person or persons whose negligence has proximately caused the injured employee's injuries and damages. Utah Code Ann. §34A-2-106 provides, in pertinent part:

- (1) When any injury or death for which compensation is payable under this [workers compensation] chapter ... is caused by the wrongful act or neglect of a person other than an employer, officer, agent, or employee of the employer:

...

- (b) the injured employee or the employee's heirs or personal representative may have an action for damages against the third person.

(Emphasis added.) There is no exception for fire or police officers injured in the line of duty, and there is no sound reason for the courts of the State of Utah to adopt a rule that would single out firefighters and public safety officers, from the universe of private and other public actors, for discriminatory treatment.

Cases from various jurisdictions have rejected the Fireman's Rule outright or declined to apply it to situations like the subject situation. For example, in Christensen v. Murphy, 678 P.2d 1210 (Or. 1984), the Oregon Supreme Court, in the course of reversing a judgment in favor of the defendant, stated, after first explaining that the basis for the Fireman's Rule had to do with assumption of risk:

Implied assumption of risk in both primary and secondary forms statutorily has been abolished in this state since 1975, and thus it can no longer serve as an absolute bar to a plaintiff's recovery. [Citations omitted.] That fact requires us to reexamine the "fireman's rule" to determine whether we can still hold that a fire fighter or police officer assumes the risk of another's negligence to the point of absolutely barring a public safety officer from recovering in a negligence action.

...

When we thus reexamine the "fireman's rule," we find that its major theoretical underpinning is gone. Therefore, because the rule is not sustainable under implied assumption of risk analysis, we must determine if any other supportable theory under the general rubric of "policy" will provide the foundation for the rule. The most often cited policy considerations include: 1) To avoid placing too heavy a burden on premises owners to keep their premises safe from unpredictable entrance of firefighters; 2) To spread the risk of the fire fighters' injuries to the public through workers' compensation, salary and fringe benefits; 3) To encourage the public to call for professional help and not rely on self-help in emergency situations; 4) To avoid increased litigation. ... [Citations omitted.]

Frequently, the so-called policy reasons are merely redraped arguments drawn from premises liability or implied assumption of risk, neither of which are now available as legal foundations in this state. For example, policy consideration "1" above focuses on the fire fighter as a class from whom the premises owner needs immunity (akin to a licensee or trespasser), not on the reasonableness of the activity of the premises owner in the circumstances. ...

The remaining policy arguments are equally flawed. The weakness in the loss-spreading rationale, "2" above, is obvious. By denying a public safety officer recovery from a negligent tortfeasor, the officer is not directed to recover his damages from the general public; rather the officer is totally precluded from recovering these damages from anyone. Contrast this with other public employees who are injured when confronting dangers on their jobs. The latter can recover workers' compensation and salary benefits from the public, but are also allowed additional tort damages from the third-party tort-feasors. Under the

“fireman’s rule” the injured public safety officer must bear a loss which other public employees are not require to bear. ...

As for “3” above, Dean Prosser criticized as “preposterous rubbish” the argument offered to defend the “fireman’s rule” that tort liability might deter landowners from uttering cries of distress in emergency situations. [Citations omitted.] We agree. Furthermore we have previously rejected “4” above, avoidance of increased litigation, as a ground for denying substantive liability. [Citations omitted.]

As a result of statutory abolition of implied assumption of risk, we hold that the “fireman’s rule” is abolished in Oregon as a rule of law and no longer can bar recovery of damages for personal injuries sustained by a public safety officer, in the course of his or her employment, as a result of a defendant’s negligent conduct.

*Id.* at 1216-18 (emphasis added).

In Banyai v. Arruda, 799 P.2d 441 (Colo. App. 1990), the Colorado Court of Appeals, in the course of reversing the dismissal of a police officer’s claim against a driver whose negligence caused a collision and caused the officer to be present at the scene, where the officer’s vehicle was rearended by other drivers, explained:

We do not view employment as a firefighter or police officer as legal acceptance of the negligence of others who expose the officer to injury in connection with an automobile accident. This is especially so when consideration is given to the fact that other public employees, like citizens in general, remain entitled to assert their claims.

...

While the officer’s special skills, training, and experience may be considered with reference to any comparative negligence involved, in our view, a per se grant of immunity to those whose negligence creates a dangerous situation for the officer is an unwarranted departure from

the general duty imposed to exercise due care for the safety of others. [Citation omitted.] Thus, we hold that a duty existed in this case for the drivers to exercise due care towards Banyai consistent with the law of negligence as applied in this state.

*Id.* at 443 (emphasis added).

One of the most eloquent statements of rejection of the Fireman's Rule is the following, appearing in the course of the South Carolina Supreme Court's answer to a question certified by a federal district court, in Minnich v. Med-Waste, Inc., 564 S.E.2d 98, 103 (S.C. 2002):

In our view, the tort law of this state adequately addresses negligence claims brought against non-employer tortfeasors arising out of injuries incurred by firefighters and police officers during the discharge of their duties. We are not persuaded by any of the various rationales advanced by those courts that recognize the firefighter's rule. The more sound public policy -- and the one we adopt -- is to decline to promulgate a rule singling out police officers and firefighters for discriminatory treatment.

(Emphasis added.)

Courts of other states have declined to apply the Fireman's Rule to situations other than those that originally gave rise to the rule (those in which injured firemen sought to obtain tort recovery from those to whose premises they were summoned in emergency situations and subsequently injured). In Lave v. Neumann, 317 N.W.2d 779 (Neb. 1982), the plaintiff, a policeman, was injured when he ran after a truck that had started moving after having been

negligently left on the street by the defendant. The Nebraska Supreme Court held, in the course of affirming a judgment in favor of the plaintiff:

The reasons which justify the application of the fireman's rule in cases where firemen were injured in fires involving personal property are the same reasons which support the rule in fires involving real property. A similar analogy cannot be made as to policemen injured while performing their duty not on private premises.

...

We see no reason why, under the facts of this case, a policeman injured in the performance of his duty, by the negligence of another, has any less right to be compensated for his injuries than a person not a policeman.

*Id.* at 782 (emphasis added).

In Levandoski v. Cone, 841 A.2d 208 (Conn. 2004), the Connecticut Supreme Court held, in the course of affirming a judgment in favor of the plaintiff:

The common-law "firefighter's rule" provides, in general terms, that a firefighter or police officer who enters private property in the exercise of his duties occupies the status of a licensee and, therefore, is owed a duty of care by the property owner that is less than that owed to an ordinary invitee. [Citations omitted.] Thus, under the firefighter's rule, the landowner generally owes the firefighter or police officer injured on his property "only the duty not to injure him willfully or wantonly ...." The principle issue in this appeal is whether the firefighter's rule should be extended beyond the scope of premises liability so as to bar a police officer from recovering, based on a claim of ordinary negligence, from a tortfeasor who is neither an owner nor a person in control of the premises. The defendant, who is not a landowner or a person in control of land, appeals from the judgment of the trial court, following a jury trial, in favor of the plaintiff, a police officer who was injured by the defendant's negligent conduct on the land of another person. We

conclude that the firefighter's rule should not be so extended and, accordingly, we affirm the judgment of the trial court in favor of the plaintiff.

*Id.* at 209 (emphasis added).

As demonstrated by these cases, the appellate courts of the State of Utah would not be unique in rejecting the discriminatory Fireman's Rule outright or as applied to the facts<sup>2</sup> of this case.

It may also be worth noting that the jurisdictions that apply the Fireman's Rule implicitly or expressly make a distinction between those whose negligence creates the situation to which fire or police officers respond and those whose negligence (like that of the driver who struck Mr. Fordham) is the more immediate cause of harm. If the Fireman's Rule is consistently applied, based on its supposed policy underpinnings such as assumption of risk, the officers' working for all the taxpayers, and the proposition that workers compensation benefits are, in any event, available to public safety officers injured on the job, there should be no such distinction; and the Fireman's Rule should, if it is applied consistently, work to prohibit public safety officers from suing anyone for any injuries negligently inflicted on them in the course of their

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<sup>2</sup> Mr. Fordham was injured when he was struck by a vehicle on a public highway and not while he was fighting a fire or responding to a fire on Mr. Oldroyd's property. The hoariest basis for invocation of the Fireman's Rule is thus clearly lacking in this case.



job duties. And yet no court seems to hew to the proposition that a police officer such as Mr. Fordham is unable to proceed against a person who (like the driver who struck Mr. Fordham) negligently injures him after he arrives at the scene to assist in a situation caused by an earlier negligent actor such as Mr. Oldroyd.<sup>3</sup> This is so although there is, when one considers the concept of creation of risk and how broadly and in how many differing situations that concept is addressed in Utah tort law, no meaningful distinction between the risk created by someone who negligently sets up a potentially dangerous situation and the person whose negligence is the more immediate cause of the injury. For a public safety officer risks his or her safety, as an inherent part of his or her job, is paid by the taxpayers, and may recover workers compensation benefits, regardless of whether he or she is injured by the person whose negligence occasions his or her presence, the negligence of the person whose vehicle strikes him or her, or a combination of both.

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<sup>3</sup> Mr. Oldroyd has so acknowledged, in his Reply Memorandum in support of his Motion for Summary Judgment, submitted in the District Court proceedings:

The Fireman's Rule precludes suit only against a citizen whose ordinary negligence occasioned the presence of the public safety officer. Independent acts of negligence that injure a safety officer at the scene, such as the negligence of ... the driver who struck and injured Mr. Fordham, are not insulated from suit.

R. 132.

The Fireman's Rule did not prohibit Mr. Fordham from pursuing his claim against the driver who struck him even though one of the risks of his employment was that he might be struck by such a person. And yet the Fireman's Rule, as adopted and applied by the courts of some states and as adopted and applied by the District Court in this case, works to prohibit Mr. Fordham from pursuing his claim against Mr. Oldroyd. That inconsistency appears to constitute another problem with the putative wisdom of the Rule and constitutes another reason for this Court to decline to adopt it.

## **VI. CONCLUSION**

The Fireman's Rule is at odds with the principle at the heart of Utah tort law that each tortfeasor should bear his, her, or its fair share of responsibility, as determined by a jury, for damages his, her, or its negligence has proximately caused another. Also, adoption of the Rule by the appellate courts of Utah would amount to unfair discrimination against Utah public safety officers; the Rule does not apply to private persons and it does not apply to other public employees. Nor do the various reasons offered in support of the Rule appear to hold water. Assumption of the risk is not an absolute defense but should be viewed under the umbrella of comparative fault. The fact that Mr. Fordham, like other public safety officers injured in the course of their job duties, is paid by the taxpayers and the fact that he has received workers

compensation benefits have no pertinent legal significance. Furthermore, the Rule's prohibition of claims against those whose negligence causes peace officers to be at scenes where they are injured but non-prohibition of claims against those whose negligence more directly causes injury is illustrative of its logical weakness.

This Court should rule (for reasons such as those articulated by the courts in Christensen (pp. 13-15), Banyai (pp. 15-16), and Minnich (p. 16), above) that there is no need or good public policy reason for any aspect of the Fireman's Rule to be made part of Utah common law. Alternatively, the Court should decline to apply the Fireman's Rule to the facts of this case and rule (similar to the holdings of the Lave and Levandoski cases discussed at pp. 16-18, above) that Mr. Fordham may proceed with his claim against Mr. Oldroyd.

This Court should, in any event, reverse the Summary Judgment so that this case may proceed to trial and so that the jury may decide questions that jurors typically decide in personal injury negligence actions (including, if Mr. Oldroyd cares to pursue such a contention, and if there is sufficient evidence to support such a contention, Mr. Fordham's own supposed negligence in doing what he was doing).

Respectfully submitted this 23<sup>rd</sup> day of June, 2005.



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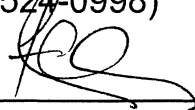
PETER C. COLLINS  
PETER C. COLLINS, L.L.C.  
Attorney for Plaintiff-Appellant

### CERTIFICATE OF SERVICE

I hereby certify that, on the 23<sup>rd</sup> day of June, 2005, I caused to be served two true and correct copies of the foregoing OPENING BRIEF OF PLAINTIFF-APPELLANT, RICHARD G. FORDHAM by the method indicated below, and addressed to the following:

David W. Lund  
PETERSEN & ASSOCIATES  
230 South 500 East, #400  
Salt Lake City, UT 84102

☒ HAND-DELIVERED  
☐ U.S. MAIL  
☐ OVERNIGHT MAIL  
☐ TELECOPY (FAX)  
(524-0998)



## **ADDENDUM**

**FILED DISTRICT COURT**  
Third Judicial District

MAR 25 2005

By \_\_\_\_\_ SALT LAKE COUNTY

Deputy Clerk

David W. Lund (Bar No. 5106)  
PETERSEN & ASSOCIATES  
Attorneys for Defendant  
230 South 500 East, Suite 400  
Salt Lake City, UT 84102  
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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

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RICHARD G. FORDHAM,	)	ORDER GRANTING DEFENDANT'S
	)	MOTION FOR SUMMARY
Plaintiff,	)	JUDGMENT
	)	
vs.	)	
	)	
RYAN OLDROYD,	)	Case No. 040910717 PI
	)	
Defendant.	)	Judge L.A. Dever
	)	


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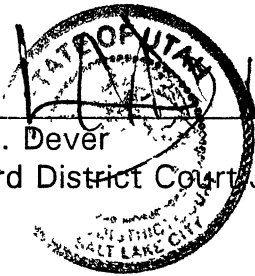
THE COURT, having considered Defendant's Motion for Summary Judgment, dated January 7, 2005, together with memoranda submitted by counsel for all parties, and the Court having entertained oral argument on the motion, hereby ORDERS that Defendant's Motion for Summary Judgment is GRANTED. The Court finds that summary judgment is appropriate pursuant to the provisions of the "Fireman's Rule". Plaintiff, as a highway patrol trooper, acting in the course and scope of his employment, cannot maintain a cause of action against Defendant for injuries sustained when he was struck by another driver while at the scene of a rollover accident caused by Defendant's negligence. The Court finds that the type of risk

which resulted in injury to the Plaintiff is precisely the type of risk Plaintiff was hired to confront as a highway patrol trooper, and the "Fireman's Rule" therefore precludes Plaintiff's claim of negligence against Defendant.


ORDERED this 21 day of March, 2005.

BY THE COURT:

  
\_\_\_\_\_  
L.A. Dever  
Third District Court Judge



APPROVED AS TO FORM:

  
\_\_\_\_\_  
Peter C. Collins, Esq.  
Attorney for Plaintiff